

Victim Impact Statements & Other Post-Disposition Procedures

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In this chapter. . .

This chapter focuses on two key methods by which victims participate in sentencing or disposition and other post-conviction or post-adjudication proceedings: victim impact statements and the victim's right to appeal a prisoner's grant of parole. Victim impact statements allow victims the opportunity to inform courts and corrections agencies of the physical, emotional, and financial effects of victimization. This direct participation by the victim in the proceedings often increases victim satisfaction with the courts and agencies. Victim impact statements also allow courts and corrections agencies to acknowledge the personal nature of the harm suffered, and to set appropriate sentences and juvenile dispositions, restitution amounts, and release conditions.

This chapter includes discussion of the following topics:

- F courts' broad authority to consider victim impact information when fashioning sentences or juvenile dispositions;
- F the required procedures for including victim impact statements in presentence investigation reports and disposition reports;
- F the required procedures for delivering oral impact statements at sentencing, disposition, and post-sentencing and post-disposition hearings; and

F the required procedures for victim appeals of grants of parole.

Section 9.9 contains sample forms for eliciting victim impact statements.

Victim impact statements are also discussed in other portions of this manual. See Sections 5.8 (Access to Victim Impact Information Prior to Trial), 6.3 (The Role of Victim Impact Information in “Sentence Bargaining”), 6.4 (Limitations on the Court’s Authority to Utilize Informal Procedures in Juvenile Delinquency Cases), 7.9 (Notification of Conviction or Adjudication and the Right to Participate in Sentencing or Disposition), 7.12(B) (Intent to Place Prisoner in Special Alternative Incarceration Program (“Boot Camp”)), and Sections 10.10–10.11 (required procedures for determining the proper amount of restitution to order).

9.1 The Victim’s Constitutional Right to Make a Statement at Sentencing

A crime victim’s right to make a statement at sentencing is preserved in Const 1963, art 1, § 24. The relevant provision states:

“(1) Crime victims, as defined by law, shall have the following rights, as provided by law:

...

The right to make a statement to the court at sentencing.”

The victim’s right to be heard at sentencing and dispositional hearings is discussed in Section 9.2.

9.2 Using Victim Impact Statements at Sentencing or Disposition

A crime victim has the rights to submit an impact statement for inclusion in a presentence investigation report or dispositional report and to deliver an oral impact statement to the court at sentencing or disposition. These rights are discussed in Sections 9.2(A) and 9.2(B), respectively.

A sentencing court may properly consider the actual or possible impact of the crime on the victim in tailoring the sentence. See *Payne v Tennessee*, 501 US 808, 825; 111 S Ct 2597; 115 L Ed 2d 720 (1991) (“[v]ictim impact evidence is simply another form or method of informing the sentencing authority about the specific harm caused by the crime in question, evidence of a general type long considered by sentencing authorities”), *People v Wilson*, 172 Mich App 481, 483 (1988) (the sentencing court could consider a victim’s impact

statement prior to the effective date of the Crime Victim's Rights Act), and *People v Girardin*, 165 Mich App 264, 266–67 (1987) (the sentencing court could consider the possible future psychological repercussions to the six-year-old sexual assault victim even though no evidence established that such repercussions would occur).

In *People v Jones*, 179 Mich App 339 (1989), the trial judge refused to accept the defendant's plea to manslaughter until after he had discussed the plea with the victim's family. The victim's father requested the maximum possible sentence. In response to a question by the victim's mother, the judge stated that a sentence of less than 10 years was possible but unlikely. *Id.* at 340–41. The judge accepted the defendant's plea. At sentencing, the victim's sister read an oral impact statement on behalf of the family, during which she asked for the maximum possible sentence. *Id.* at 342. The judge imposed the maximum possible sentence, and the defendant appealed, arguing that he was deprived of due process by the judge's exposure to inflammatory and prejudicial statements by the victim's family. The Court of Appeals disagreed, finding that the trial judge's consideration of the impact of the crime on the victim's family did not produce actual bias or prejudice. *Id.* at 342–43.

In *People v Rodriguez*, 124 Mich App 773, 778 (1983), the Court of Appeals found no reversible error where the judge held an ex-parte conference with a sexual assault victim after conviction but before sentencing. The Court concluded that such a conference did not constitute a critical stage of the proceedings at which the defendant had a right to be present. *Id.* at 777. Instead, the conference was analogous to probation officer interviews of crime victims for the purpose of including victim impact information in a presentence investigation report. *Id.** The Court noted that, while a judge's postconviction, presentence interview of a sexual assault victim may not be a wise practice, there was no indication that the victim's statements to the judge in this case differed from what the defendant had said during the plea proceeding. *Id.* at 777–78.

*See Sections 9.2(A) (victim impact information in presentence investigation and disposition reports) and 9.2(C) (court's use of letters sent to it by victims and third parties).

A. Using Victim Impact Statements in Presentence Investigation Reports

1. Required Procedures

Before the court imposes a felony sentence on an adult or a juvenile convicted as an adult, a probation officer must complete a presentence investigation report ("PSIR"). In misdemeanor cases, the court may order a probation officer to complete a PSIR. MCL 771.14(1); MSA 28.1144(1), MCL 771.14a(1); MSA 28.1144(1)(1), and *People v Shackelford*, 146 Mich App 330, 336 (1985) (the court should articulate "a good reason" for refusing to order a PSIR in a misdemeanor case). Because a juvenile delinquency proceeding is not a criminal proceeding governed by the Code of Criminal Procedure, the court need not consider a PSIR or its equivalent before imposing a juvenile disposition. MCR 5.943(C)(1) and *In re Lowe*, 177 Mich App 45, 47 (1989).

*See Section 9.9 for sample victim impact statement forms.

*See Section 9.2(C), below, for a discussion of the court's use of letters sent to it by the victim.

If the victim requests, a written impact statement must be included in the PSIR if it is prepared. MCL 771.14(2)(b); MSA 28.1144(2)(b).^{*} In cases under the felony article of the CVRA, the victim has the right to submit a written impact statement, or make an oral impact statement, to the probation officer preparing the PSIR for inclusion in the PSIR:

“The victim has the right to submit or make a written or oral impact statement to the probation officer for use by that officer in preparing a presentence investigation report concerning the defendant pursuant to [MCL 771.14; MSA 28.1144]. A victim’s written statement shall upon the victim’s request[] be included in the presentence investigation report.” MCL 780.764; MSA 28.1287(764).

In juvenile delinquency, designated, and serious misdemeanor cases, the victim also has the right to submit an oral or written impact statement if a disposition or presentence investigation report is prepared. MCL 780.792(1) and (3); MSA 28.1287(792)(1) and (3), and MCL 780.824; MSA 28.1287(824). If no presentence investigation report is prepared in a “serious misdemeanor” or designated case involving a misdemeanor, the court must “notify the prosecuting attorney of the date and time of sentencing at least 10 days prior to the sentencing.” MCL 780.792(2); MSA 28.1287(792)(2), and MCL 780.825; MSA 28.1287(825). After the prosecuting attorney notifies the victim of the sentencing date, the victim may submit a written impact statement to the prosecutor or court. *Id.*^{*}

The victim must be notified that his or her impact statement in the presentence investigation or disposition report will be made available to the defendant or juvenile and defense counsel unless the court exempts portions of it from disclosure. MCL 780.763(1)(e); MSA 28.1287(763)(1)(e), MCL 780.791(2)(c); MSA 28.1287(791)(2)(c), and MCL 780.823(1)(e); MSA 28.1287(823)(1)(e). The sentencing court may exempt from disclosure “sources of information obtained on a promise of confidentiality.” MCL 771.14(3); MSA 28.1144(3), MCL 771.14a(2); MSA 28.1144(1)(2), and MCR 6.425(B). If the court exempts information from disclosure, the court must inform the parties of the nondisclosure, note the exemption in the PSIR, and state on the record its reasons for this action. MCR 6.425(B). See *People v Mellado*, unpublished opinion per curiam of the Court of Appeals, decided March 12, 1992 (Docket No. 133711) (resentencing was required where the trial court exempted victim impact statements from disclosure to defendant before sentencing without following the procedures required by MCR 6.425(B)).

The court must resolve challenges to information in the PSIR or make a finding that it will not consider the challenged information. MCR 6.425(D)(3). The defendant must object to the accuracy or relevancy of information in the PSIR at or before the sentencing hearing in order to preserve the objection for appeal. MCR 6.429(C). See also *People v Dilling*, 222 Mich App 44, 53 (1997) (the sentencing court did not abuse its discretion

by refusing to adjourn the juvenile sentencing hearing because the juvenile and defense counsel had adequate opportunity to review the PSIR before the hearing).

2. Contents of the Victim Impact Statement

MCL 780.763(3)(a)–(d); MSA 28.1287(763)(3)(a)–(d), state that the prosecuting attorney must notify the victim that the victim’s impact statements may include but are not limited to the following:*

“(a) An explanation of the nature and extent of any physical, psychological, or emotional harm or trauma suffered by the victim.

“(b) An explanation of the extent of any economic loss or property damage suffered by the victim.

“(c) An opinion of the need for and extent of restitution and whether the victim has applied for or received compensation for loss or damage.*

“(d) The victim’s recommendation for an appropriate sentence.”

The juvenile and misdemeanor articles contain substantially similar provisions. MCL 780.791(3)(a)–(d); MSA 28.1287(791)(3)(a)–(d), and MCL 780.823(3)(a)–(d); MSA 28.1287(823)(3)(a)–(d).

3. Use of the PSIR Following Sentencing

The PSIR is sent to the correctional institution along with the prisoner. MCL 771.14(8); MSA 28.1144(8), and MCL 771.14a(6); MSA 28.1144(1)(6). A victim impact statement may describe the offense that actually occurred rather than the offense of which the defendant was convicted. See *People v Pureifoy*, 128 Mich App 531, 536 (1983) (the complainant’s detailed description of an alleged sexual assault was properly allowed to remain in the PSIR after it was sent to the Department of Corrections where the defendant was acquitted of the assault, but where the defendant had an opportunity at sentencing to refute the allegations by the complainant). Information about the victim taken from the PSIR is used in determining a prisoner’s parole eligibility. See MCL 771.14(9); MSA 28.1144(9) (prisoner must be provided with a copy of the PSIR before a parole interview is conducted).*

Note: The court may include a transcript of the victim’s oral impact statement with the PSIR before transmitting it to the correctional institution.

*See Section 9.9 for sample victim impact statement forms that elicit the types of information listed in the statute.

*Chapter 10 contains a detailed discussion of restitution.

*See Section 9.5(A) for further discussion of the use of the victim impact statement during parole proceedings.

B. At Sentencing or Disposition Hearings

*The provision for delivery of the statement by a designee is effective June 1, 2001.

*See also Section 8.12 for a discussion of the requirements for the use of sign or foreign language interpreters.

In addition to providing impact information for inclusion in the PSIR or juvenile dispositional report, the victim or a person designated by the victim* may deliver an oral impact statement to the court at the sentencing or disposition hearing. MCL 780.765; MSA 28.1287(765), of the felony article of the CVRA, states:

“The victim has the right to appear and make an oral impact statement at the sentencing of the defendant. If the victim is physically or emotionally unable to make the oral impact statement, the victim may designate any other person 18 years of age or older who is neither the defendant nor incarcerated to make the statement on his or her behalf. The other person need not be an attorney.”*

A substantially similar provision applies to juvenile delinquency, designated, and “serious misdemeanor” cases. MCL 780.793(1); MSA 28.1287(793)(1), and MCL 780.825; MSA 28.1287(825).

Note: If a person chosen by the victim will deliver the oral impact statement, the victim should provide his or her designee with a written statement to read to the court.

The court must give the victim “an opportunity to advise the court of any circumstances [he or she] believe[s] the court should consider in imposing sentence.” MCR 6.425(D)(2)(c). See also *People v Steele*, 173 Mich App 502, 504–05 (1988) (although the victim’s impact statements were emotional, they were within her statutory rights, and the defendant did not object to the statements).

For cases that fall under the felony and misdemeanor articles, an individual who is incarcerated and who otherwise falls under the definition of a “victim” “may submit a written statement to the court for consideration at sentencing.” MCL 780.752(4); MSA 28.1287(752)(4), and MCL 780.811(4); MSA 28.1287(811)(4).

The prosecuting attorney may not seek resentencing if the victim did not make an impact statement because the prosecutor failed to notify the victim of the sentencing date. In *People v Pfeiffer*, 207 Mich App 151 (1994), the prosecutor mistakenly told the minor victim’s family that sentencing would not occur on the scheduled date. On the date set for sentencing, the court sentenced the defendant to 10–20 years in prison. The prosecutor subsequently moved for resentencing on the ground that the victim had been denied the right to make an oral impact statement at sentencing. The sentencing court granted the prosecutor’s motion and, after hearing the family members’ impact statements, resentenced the defendant to 15–30 years in prison. The Court of Appeals reinstated the original 10–20 year sentence. *Id.* at 155. The Court of Appeals rejected the prosecutor’s argument that the

failure to allow the victim to make a statement at sentencing is as grave an error as the failure to allow the defendant to do so. The Court of Appeals reasoned that the CVRA does not confer remedial rights on victims or prosecutors. Moreover, a sentencing court may only modify an invalid sentence, and a sentence is invalidated only by a defect that affects the defendant's rights. *Id.* at 156–58. The Court of Appeals added that the sentencing court did consider an impact statement by the minor victim's parents that was contained in the PSIR. *Id.* at 158–59.

C. The Court's Use of Letters Sent by Victims and Others to the Court

Prior to sentencing, a victim may send a letter to the court describing the effects of the crime. In *People v McAllister*, 241 Mich App 466, 474–75 (2000), the defendant argued that he was entitled to examine letters sent by the victim and the victim's family to the court prior to sentencing. The defendant cited *United States v Hayes*, 171 F3d 389 (CA 6, 1999), in which the sentencing court relied on the victims' letters in imposing the maximum possible sentence. The *Hayes* court held that reversal is required where the sentencing court relies on ex parte communications in determining the defendant's sentence. The Court of Appeals in *McAllister* distinguished *Hayes*, finding that there was no evidence that the sentencing court relied on the letters' contents in sentencing the defendant. Moreover, the contents of the victim's letter to the court were cumulative to evidence admitted at trial and information disclosed by the victim's oral impact statement. The Court of Appeals also expressed confidence that trial judges "are able to separate the evidence at trial from the subjective requests of victims or their family members." *McAllister, supra*, at 476. Judge Whitbeck concurred in the result but wrote separately to state that such letters should be disclosed in all cases because the sentencing court must allow the defendant an opportunity to rebut or explain facts introduced for the purpose of sentencing. *Id.* at 479, citing *People v Ewing (After Remand)*, 435 Mich 443, 446, 474 (1990).

Thus, if the court receives letters directly from the victim or others, such letters must be disclosed to the parties prior to sentencing *if the court will rely on information contained in the letters at sentencing or disposition*. If the letters are disclosed, victim identifying information should be deleted. MCL 780.758(2); MSA 28.1287(758)(2), MCL 780.830; MSA 28.1287(830), and MCR 5.903(A)(18).

9.3 Impact Statements by Third Parties

In *People v Kisielewicz*, 156 Mich App 724, 728–29 (1986), the defendant was convicted of vehicular manslaughter. The presentence investigation report contained copies of letters from the deceased victim's parents, grandparents, aunt, uncle, and an attorney.* The Court of Appeals held that the sentencing judge properly considered all of the letters. The letters from the

*See Section 3.2(O) for the definition of "victim" under the CVRA.

deceased victim's parents were properly included in the PSIR under MCL 780.764; MSA 28.1287(764), because the parents met the statutory definition of "victim." Although the other letters were not from "victims" as defined by statute, the letters concerned society's need to be protected from the offender, which is a valid sentencing consideration.

In *People v Albert*, 207 Mich App 73, 74 (1994), the Court of Appeals found no error in allowing an attorney who was representing one of the victims in a separate civil suit to address the court at sentencing. The attorney called the defendant, who was convicted of criminal sexual conduct against two child victims, a "pedophiliac." The Court of Appeals concluded that the sentencing court was entitled to consider relevant information about the defendant's life and circumstances, and no bias or prejudice resulted from the attorney's statements. *Id.* at 74–75.

9.4 Victim Impact Statements at Commitment Review and Final Review Hearings for Juveniles

*See Section 7.12(F) for a discussion of these required review hearings.

When a juvenile is committed to the Family Independence Agency in a juvenile delinquency, designated, or "automatic waiver" case, the court must conduct review hearings at designated times during the period of the juvenile's commitment.* Victims have the rights to submit written impact statements for use at these hearings, to make oral impact statements at these hearings, or both. MCL 780.770b; MSA 28.1287(770b), and MCL 780.798(9); MSA 28.1287(798)(9).

9.5 Victim Participation in Parole Hearings

A. Parole Guidelines and Victim Impact Statements

The decision to grant or deny parole is initially made by a majority vote of a three-member parole board panel. MCL 791.206(2); MSA 28.2276(2). "A prisoner shall not be given liberty on parole until the board has reasonable assurance, after consideration of all of the facts and circumstances, including the prisoner's mental and social attitude, that the prisoner will not become a menace to society or to the public safety." MCL 791.233(1)(a); MSA 28.2303(1)(a).

In making its decision, the parole board panel must consider parole guidelines established by the Department of Corrections ("department") under which the parole board determines whether the prisoner has a lower or higher probability of parole. 791.233e(5); MSA 28.2303(6)(5). However, the parole board may depart from a recommendation under the guidelines for "substantial and compelling reasons stated in writing." MCL 791.233e(6); MSA 28.2303(6)(6).

In determining the prisoner's parole guideline score, the parole board must consider numerous factors. Similar factors are also considered when computing the recommended minimum sentence under the legislative sentencing guidelines. The factors used to determine the prisoner's parole eligibility include the following factors related to victim impact set forth in 1996 AC, R 791.7716(3):

- F physical or psychological injury to a victim;
- F excessive violence or cruelty to a victim beyond that necessary to commit the offense;
- F the commission of a sexual offense or sexually assaultive behavior;
- F whether the victim was transported or held captive for a period beyond that necessary to commit the offense; and
- F whether the victim was unusually vulnerable, as reflected by age, impairment, or physical disproportionality.

Note: In most cases, a prisoner's maximum sentence is determined by the statute under which the prisoner was convicted, and the court fixes only the minimum term to be served by the defendant. MCL 769.8; MSA 28.1080. For crimes committed on or after January 1, 1999, the court must fix the minimum sentence by using the legislative sentencing guidelines. See MCL 769.34; MSA 28.1097(3.4). However, where there is a substantial and compelling reason to do so, the court may depart from the guidelines recommended minimum sentence. MCL 769.34(3); MSA 28.1097(3.4)(3).

The sentencing guidelines consider the offender's prior offense record and "offense variables" in setting forth the recommended minimum sentence for a given offense. See MCL 777.1 et seq.; MSA 28.1274(11) et seq. Examples of "offense variables" that take into consideration the impact of a crime on the victim include the following:

- Offense variable 3: physical injury to victim, MCL 777.33; MSA 28.1274(43);
- Offense variable 4: psychological injury to victim, MCL 777.34; MSA 28.1274(44);
- Offense variable 5: psychological injury to victim's family, MCL 777.35; MSA 28.1274(45);
- Offense variable 7: aggravated physical abuse, MCL 777.37; MSA 28.1274(47);
- Offense variable 8: victim was carried away or held captive, MCL 777.38; MSA 28.1274(48); and

- Offense variable 10: exploitation of a vulnerable victim, MCL 777.40; MSA 28.1274(50).

If the victim requests, not less than 30 days before a pending parole review, the department must provide notice of the victim's right to submit a written statement. MCL 780.771(2); MSA 28.1287(771)(2). At his or her own expense, the victim may be represented by counsel at a parole review hearing. *Id.*

The victim has the right to address or submit a statement to a parole board member or a member of "any other panel having authority over the prisoner's release on parole." MCL 780.771(1); MSA 28.1287(771)(1). The parole board must consider the victim's statement before deciding whether to grant or deny parole. MCL 791.235(1); MSA 28.2305(1), and 1996 AC, R 791.7715(1).

Notice of the parole board's or panel's decision must include the date of the prisoner's release on parole if the prisoner is granted parole. MCL 780.771(3); MSA 28.1287(771)(3).^{*} This notice must be mailed "within a reasonable time after the board or panel reaches its decision but not later than 14 days after the board or panel has reached its decision." *Id.* In addition, the notice must apprise the victim of his or her right to appeal a grant of parole pursuant to MCL 791.234; MSA 28.2304. MCL 780.771(3); MSA 28.1287(771)(3).

*See Section 4.7 for a discussion of parole conditions to protect a named person.

B. Victims' Right to Appeal a Grant of Parole

1. Filing the Application

A crime victim has standing to file an application for leave to appeal a decision of the parole board granting a prisoner parole. MCL 791.234(9); MSA 28.2304(9), states that the "prosecutor of the county from which the prisoner was committed or the victim of the crime for which the prisoner was convicted" may appeal a grant of parole. A crime victim has no right to participate in parole revocation proceedings. *In re Wayne Co Prosecutor*, 232 Mich App 482, 486 (1998).^{*}

An application for leave to appeal the decision of the parole board must be filed in the circuit court for the sentencing county. MCR 7.104(D)(1). The application must state the grounds for the appeal and describe the prior proceedings. MCR 7.103(B)(2).

If the victim has requested notice of parole proceedings pursuant to MCL 780.771; MSA 28.1287(771),^{*} the parole board must notify the victim of its decision to grant the prisoner parole. However, an order of parole shall not be issued until 28 days after that notice and a copy of any written opinion are mailed to the victim. MCR 7.104(D)(2)(a). The victim may file an application for leave to appeal within 28 days after the parole board mails the notice of action granting parole, or the victim may file a delayed application for leave to appeal along with an affidavit explaining the delay. MCR 7.104(D)(2)(a)–

*A victim must be notified if the prisoner is convicted of a new crime or if the prisoner's parole is revoked. See Section 7.12(I).

*See Section 9.5(A), above, for a discussion of this notice provision.

(b) and 7.103(B)(6). “The circuit court may consider the length of and the reasons for the delay in deciding whether to grant the application.” MCR 7.103(B)(6). However, a delayed application for leave to appeal a grant of parole may not be filed more than six months after the entry of the order granting parole. MCR 7.103(B)(6).

If the victim requests, he or she may receive the prisoner’s current parole eligibility report, any prior parole eligibility reports that are mentioned in the parole board’s decision, and the prisoner’s current parole guidelines score. MCR 7.104(D)(2)(a). The parole eligibility report contains the prisoner’s misconduct, work, and educational records, mental or psychiatric examination results, and other information describing the prisoner’s behavior while imprisoned. See MCL 791.235(7)(a)–(e); MSA 28.2305(7)(a)–(e). The Court of Appeals has held that “where a prosecutor seeks records of a prisoner’s psychological or psychiatric treatment, for purposes of evaluating a Parole Board decision, the records are not protected by the psychologist-patient privilege.” *Oakland Co Prosecutor v Dep’t of Corrections*, 222 Mich App 654, 659 (1997). Although the Court of Appeals did not address whether the prisoner could assert the privilege against others, it did note that disclosure of privileged information to third parties destroys the privilege. *Id.* at 658. The results of a prisoner’s mental or psychiatric examinations must be contained in a parole eligibility report, which is disclosed to the parole board. See MCL 791.235(7)(c); MSA 28.2305(7)(c).

2. Serving the Application

If the victim files an application for leave to appeal, the victim must timely serve the application on the parole board, prisoner, and prosecutor. MCR 7.104(D)(2)(c). A copy of the application and supporting documents must be sent to the parole board, prisoner, and prosecutor by registered or certified mail, return receipt requested, and a copy of the return receipt signed by the recipient must be attached to the proof of service filed with the circuit court. MCR 7.104(D)(2)(c)(i)–(iii). To properly serve the prisoner, the victim must send a copy of the application and supporting documents to the facility where the prisoner is incarcerated, with instructions to personally serve the prisoner. SCAO Form CC 404 must accompany the pleadings sent to the prisoner. MCR 7.104(D)(2)(c)(iii).*

*See Section 9.8 for a copy of this form.

Note: If the prosecutor appeals a grant of parole, the prosecutor must serve a copy of the application on a victim who has requested notice of parole proceedings pursuant to MCL 780.771; MSA 28.1287(771). MCR 7.104(D)(2)(c).

3. Stay of Enforcement of Order Granting Parole

Pursuant to MCR 7.105(G), the court may order a stay of enforcement of the order granting parole. That rule states, in relevant part, as follows:

“(1) The filing of a petition for review does not stay enforcement of the decision or order of which review is

sought. The court may order a stay on appropriate terms and conditions only:

“(a) after hearing on the written motion for stay that is supported by affidavit and states with particularity the grounds therefor;

“(b) on finding:

“(i) that the applicant will suffer irreparable injury if a stay is not entered;

“(ii) that the applicant has made a strong showing that it is likely to prevail on the merits;

“(iii) that the public interest will not be harmed if a stay is granted; and

“(iv) that the harm to the applicant in the absence of a stay outweighs the harm to other parties to the proceedings if a stay is granted. . . .

. . . .

“(2) The court may grant a temporary stay of enforcement without written notice to the respondent only if it clearly appears from specific facts shown by affidavit that immediate and irreparable injury will result if a stay is not entered before the respondent can be heard and only if the petitioner’s attorney certifies to the court in writing that efforts have been made to contact the respondent and the respondent’s attorney, if known, and stating that those efforts were unsuccessful. The court may use an appropriate method to communicate with a respondent regarding an application for stay of enforcement without written notice.

“A temporary stay may be granted by the court only until a hearing on a motion or order to show cause required by subrule (G)(1). A hearing on a motion to dissolve a temporary stay will be heard on 24 hours’ notice, or less on order of the court for good cause shown, and takes precedence over all matters except previously filed matters of the same character.”

4. Procedures Upon Granting Leave to Appeal

Within 28 days after the victim files an application for leave to appeal, the circuit court must determine whether to grant leave to appeal. MCR 7.104(D)(3)(b). “If the court does not make a determination within that time,

the court shall enter an order to produce the prisoner before the court for a show cause hearing to determine whether the prisoner should be released on parole pending disposition of the appeal.” *Id.*

If the court grants leave to appeal, MCR 7.103 prescribes the procedure. MCR 7.104(D)(4). MCR 7.103(C) provides that the victim must immediately serve a copy of the order granting leave to appeal on the prisoner and, if it has intervened in the action, the parole board. MCR 7.104(D)(4)(a)–(d) add four rules applicable to appeals of parole board decisions:

“(a) no bond is required;

“(b) the expense of preparing and serving the parole board’s evidentiary materials for the appeal may be taxed to a non-prevailing appellant, except that expenses may not be taxed to an indigent party;

“(c) the record on appeal shall consist of the prisoner’s central office file at the Department of Corrections, and any other documents considered by the parole board in reaching its decision. Within 14 days after being served with an order granting leave to appeal, the parole board shall send copies of the record to the circuit court and the other parties; and

“(d) within 28 days after the parties receive a copy of the record, the appellant must file a brief in the circuit court and serve it on the appellee. The appellee may file and serve a reply brief within 21 days after the appellant’s brief is served on the appellee.”

The court may remand the matter to the parole board pursuant to MCR 7.104(D)(7). That rule states as follows:

“On timely motion by a party, or on the court’s own motion, the court may remand the matter to the parole board for an explanation of its decision. The parole board shall hear and decide the matter within 28 days of the date of the order, unless the board determines that an adjournment is necessary to obtain evidence or that there is other good cause for an adjournment. The time to file briefs on appeal under MCR 7.104(D)(4)(d) is tolled while the matter is pending on remand.”

5. Burden of Proof

If the victim appeals a grant of parole, the victim has the burden of proof. The standard of proof is contained in MCR 7.104(D)(5)(a)–(b), which state:

“The burden shall be on the appellant to prove that the decision of the parole board was

“(a) in violation of the Michigan Constitution, a statute, an administrative rule, or a written agency regulation that is exempted from promulgation pursuant to MCL 24.207; MSA 3.560(107), or

“(b) a clear abuse of discretion.”

6. Procedures Following the Circuit Court’s Decision on Appeal

If the circuit court reverses the parole board’s decision or remands the case to the parole board for an explanation of its decision, the board must “review the matter and take action consistent with the circuit court’s decision within 28 days.” MCR 7.104(D)(8). This rule also requires the board to provide the parties with an opportunity to be heard “[i]f the circuit court order requires the board to undertake further review of the file or to reevaluate its prior decision.” *Id.*

MCR 7.104(D)(6) governs appeals of the circuit court’s decision. That rule states:

“An appeal of a circuit court decision is by application for leave to appeal to the Court of Appeals pursuant to MCR 7.205. The application shall be filed as an emergency appeal under MCR 7.205(E), and the Court of Appeals shall expedite its consideration of the matter.”

9.6 Victim Impact Statements at Public Hearings on Reprieves, Commutations, and Pardons

A *reprieve* temporarily postpones the execution of a sentence so that the prisoner may seek relief from the sentence. A *commutation* reduces a sentence so that the prisoner becomes eligible for parole or discharge. A *pardon* permanently cancels a sentence. *Black’s Law Dictionary* (St. Paul, MN: West, 7th ed, 1999), pp 274, 1137, and 1305.

The power to grant a reprieve, commutation, or pardon resides solely with the governor. Const 1963, art 5, § 14. The parole board may recommend that the governor grant or deny a reprieve, commutation, or pardon by following the procedures contained in MCL 791.244(2); MSA 28.2314(2). Upon its own initiative or a determination that an application for a pardon, commutation, or pardon has merit, the parole board must make a full investigation and decide whether to hold a public hearing. MCL 791.244(2)(e); MSA 28.2314(2)(e). A public hearing may be conducted by one member of the parole board. MCL 791.244(2)(f); MSA 28.2314(2)(f), and 1996 AC, R 791.7760(4).

If the victim requests in writing, the Department of Corrections must give the victim notice of a public hearing regarding a reprieve, commutation, or pardon, and notice of the grant of a reprieve, commutation, or pardon by the governor. MCL 780.769(1)(h)–(i); MSA 28.1287(769)(1)(h)–(i), and MCL 780.798(4)(h)–(i); MSA 28.1287(798)(4)(h)–(i). Notice of a public hearing must be given in writing at least 30 days before the hearing. MCL 791.244(2)(g); MSA 28.2314(2)(g). The “public press” must also be notified. 1996 AC, R 791.7760(3).

At a public hearing, the victim must be given an opportunity to address the parole board or to submit written testimony for the hearing. The parole board may question the victim. MCL 791.244(2)(h); MSA 28.2314(2)(h).

9.7 Victim Impact Statements at Hearings on Setting Aside Convictions or Adjudications

An adult or juvenile offender may apply to have a conviction or juvenile adjudication “set aside” after five years if the offender has only been convicted or adjudicated once.* “Set aside” means “negate or rescind.” MCR 5.925(E)(1)(b). If the victim’s name is known, the prosecuting attorney must notify the victim of an “assaultive crime” or “serious misdemeanor” that the defendant or juvenile has applied to have the conviction or adjudication “set aside.” MCL 780.772a; MSA 28.1287(772a), MCL 780.796a(1); MSA 28.1287(796a)(1), and MCL 780.827a; MSA 28.1287(827a).

The court may, but is not required to, conduct a hearing on the defendant’s or juvenile’s application. MCL 712A.18e(8); MSA 27.3178(598.18e)(8), and MCL 780.621(8); MSA 28.1274(101)(8).* The victim has the right to appear and make a written or oral statement at any proceeding on the application. MCL 780.772a; MSA 28.1287(772a), MCL 780.796a(1); MSA 28.1287(796a)(1), and MCL 780.827a; MSA 28.1287(827a).

9.8 SCAO Form CC 404 (Notice to Prisoner of Parole Appeal)

The following form must be used to fulfill the notice requirements contained in MCR 7.104(D)(2)(c)(iii) (notice to prisoner regarding an appeal of a grant of parole), described in Section 9.5(B)(2). This form is also available on-line at www.supremecourt.state.mi.us/courtforms/appeals/cc404.pdf.

*Certain offenses may not be set aside. See Section 3.2(A) for a list of those offenses.

*For a complete discussion of the procedures required to set aside a conviction or juvenile adjudication, see Miller, *Juvenile Justice Benchbook: Delinquency & Criminal Proceedings* (MJJ, 1998), Sections 5.3 and 5.4.

| | | | |
|---|--|--|--|
| Approved, SCAO | | Original - Prisoner 1st copy - Parole board 2nd copy - Prosecutor/Victim | 3rd copy - Prison/Facility 4th copy - Court (for proof from prison/facility) 5th copy - Court (for proof from prosecutor/victim) |
| STATE OF MICHIGAN JUDICIAL CIRCUIT COUNTY | NOTICE TO PRISONER ON APPLICATION FOR LEAVE TO APPEAL DECISION OF PAROLE BOARD | | CIRCUIT CASE NO: APPEAL CASE NO: JUDGE: |
| Court address | | Court telephone no. | |

| | | |
|--|---|----------|
| Appellant | Prisoner's name, address, and inmate no. (if known) | Appellee |
| <input type="checkbox"/> THE PEOPLE OF THE STATE OF MICHIGAN <input type="checkbox"/> _____ | v | |

NOTE: This form is required under MCR 7.104(D)(2)(c). If the appropriate language is included in the application for leave to appeal, this form does not need to be used.

TO THE PRISONER:

1. An application for leave to appeal a decision to grant parole is being filed with the circuit court. (attached)
2. You are not required to respond to the attached application. If you wish to respond to the application for leave to appeal you may respond yourself or hire an attorney to respond for you.
3. If an order of parole is issued under MCL 791.236; MSA 28.2306 before the appellate proceedings are completed, a stay may be granted in the manner provided by MCR 7.105(G), except that no bond is required.

TO THE PRISON/FACILITY: You are required to personally serve this notice, the application for leave to appeal, and any supporting documents on the prisoner named above. After service on the prisoner, you must complete the proof of service below and file it with the clerk of the court.

PROOF OF SERVICE

I certify that on this date I served copies of this notice, the application for leave to appeal and any supporting documents by registered or certified mail, return receipt requested on the parole board, the prosecutor (if appropriate), and on the facility where the prisoner is incarcerated.

_____ Date

_____ Signature of applicant/attorney

Note: Attach copy(ies) of the return receipt(s) from the parole board and the prosecutor (when appropriate) and file a copy of this proof of service with the clerk of the court.

PROOF OF SERVICE ON PRISONER

I certify that on this date I personally served this notice, the application for leave to appeal and any supporting documents on the prisoner named above.

_____ Date

_____ Signature of prison official

MCR 7.104(D)(2)

CC 404 (3/96) NOTICE TO PRISONER ON APPLICATION FOR LEAVE TO APPEAL DECISION OF PAROLE BOARD

9.9 Sample Forms to Elicit Victim Impact Statements

The written victim impact statement should allow the victim to easily recount the effects of the crime, to participate in the determination of a fair sentence or disposition and appropriate restitution, and, most importantly, to heal psychologically. The statement should also allow the court to easily extract pertinent information. Alexander & Lord, *Impact Statements: A Victim's Right to Speak . . . a Nation's Responsibility to Listen* (Washington, DC: United States Department of Justice, 1994), pp 38–39. The following sample forms are intended to meet these goals. They are reproduced with the permission of the Branch County Victim-Witness Coordinator, Branch County Prosecuting Attorney's Office.

In addition, the use of separate forms to elicit information for establishing an appropriate amount of restitution may assist the victim and facilitate plea-bargaining. The form may be given to the victim early in the process so that the victim may track financial losses as they occur. Forms to elicit information concerning the physical and psychological impact of the offense may be given to victims prior to sentencing or disposition to avoid pretrial discovery of such information.*

*See Section 5.8 for further discussion of discovery of victim impact information prior to trial.